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No. 14-556

In the Supreme Court of the United States

JAMES OBERGEFELL ET AL.,

Petitioners,

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

BRITTANI HENRY ET AL.,

Petitioners,

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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COUNTERSTATEMENT

A. In 2004, Ohio Twice Retained Marriage's Traditional Definition

Ohio has always followed the traditional definition of marriage as between a man and a woman. 1 Ohio Laws 31, 31 (1803). In 2004, as debate over same-sex marriage grew, Ohioans twice voted to retain this definition.

Ohio lawmakers initially passed a law clarifying Ohio's public policy. 150 Ohio Laws pt. III 3403, 3403-07 (2004). The codified law stated:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

Ohio Rev. Code § 3101.01(C). The law disclaimed any intent to prohibit non-marriage-based benefits or to affect private contracts for those in same-sex relationships. *Id.* § 3101.01(C)(3)(a)-(b).

Around the same time, litigants were challenging similar laws. Ohio's citizens thus defined marriage in Ohio's Constitution to ensure that courts would respect their democratic choices. The amendment garnered over three million votes. Sec'y of State, *State Issue 1: Nov. 2, 2004*, *available at*

http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102Issue1.aspx (last visited Mar. 25, 2015).

Ohio's Constitution provides: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. art. XV, § 11.

B. Petitioners Brought Two Suits Challenging Ohio's Decision Not To Recognize Out-Of-State Same-Sex Marriages

1. *Obergefell v. Hodges*. James Obergefell and John Arthur brought the first suit challenging Ohio's recognition laws. JA68-69. When they sued, Arthur (who has since died) was tragically in hospice care. JA68, 367. The couple had flown to Maryland, wed inside the jet, and returned to Ohio the same day. JA23-25, 70. They received preliminary relief requiring the Director of Ohio's Department of Health to identify Arthur as married and Obergefell as his spouse on Arthur's death certificate. JA55. Two more plaintiffs then joined the suit. Petitioner David Michener married William Ives in Delaware, and Ives later died unexpectedly. JA71. Petitioner Robert Grunn, a funeral director, has same-sex couples as clients. JA76-78, 84-87.

The district court granted these Petitioners a permanent injunction in the death-certificate context. Pet. App. 217a-18a. Under due process, it adopted a new fundamental "right to remain mar-

ried," and found that Ohio could not satisfy heightened scrutiny. Pet. App. 173a-82a. Under equal protection, the court suggested that Ohio recognized *all* out-of-state opposite-sex marriages that were lawful where performed. Pet. App. 185a-86a. It then held that heightened scrutiny applied to sexual-orientation classifications, but that Ohio lacked even a rational basis for its laws. Pet. App. 192a-212a.

2. *Henry v. Hodges*. The *Henry* Petitioners—four same-sex couples married in States that permit those marriages and the adopted son of one of the couples—filed the second suit. JA372-75.

Three couples (one living in Ohio, two in Kentucky) were married in other States—New York (Brittani Henry and LB Rogers), California (Nicole and Pam Yorksmith), and Massachusetts (Kelly Noe and Kelly McCracken). JA394, 398, 402. Three of these Petitioners conceived children through artificial insemination and delivered their children in Ohio. JA394-95, 399, 402; Pet. App. 21a. They sought to have their respective partners listed on the birth certificates. JA374. Ohio law treats a woman's husband as a child's natural father if he consented to the woman conceiving the child through artificial insemination. Ohio Rev. Code § 3111.95(A). But Ohio has not extended this rule to the non-birth partner for same-sex couples. JA376-79.

The fourth couple, New Yorkers Joseph Vitale and Robert Talmas, adopted an Ohio child in a New York court. JA405. They sought an amended birth certificate from Ohio listing the couple as the parents based on that adoption decree (as the State does for opposite-sex out-of-state married couples). JA380-81, 412. But because Ohio does not recognize same-sex

marriage, the couple could not have both names listed on the birth certificate. JA405-06, 411-12.

These Petitioners alleged, as relevant here, that the failure to recognize their same-sex marriages violated the Fourteenth Amendment. JA389. The same district court from *Obergefell* ultimately enjoined the Director of Ohio's Department of Health from "denying same-sex couples validly married in other jurisdictions all the rights, protections, and benefits of marriage provided under Ohio law." Pet. App. 151a. For due process, it said that this case implicated three rights—to marry, to remain married, and to parental authority—and that the burdens on the couples outweighed the State's interests. Pet. App. 123-37a. For equal protection, its analysis tracked its *Obergefell* decision. Pet. App. 137a-47a.

C. The Sixth Circuit Held That The Constitution Leaves The Question Of Same-Sex Marriage To Democracy

The Sixth Circuit held that the Fourteenth Amendment does not require States to *license* same-sex marriage or to *recognize* same-sex marriages licensed elsewhere.

Licensing. The court offered seven reasons why the Fourteenth Amendment does not require States to license same-sex marriage. First, it viewed lower courts as bound by *Baker v. Nelson*, 409 U.S. 810 (1972). Pet. App. 23a-29a. Second, the Fourteenth Amendment's original meaning did not include a right to same-sex marriage. Pet. App. 30a-32a. Third, the court identified two rational reasons for traditional marriage. Pet. App. 32a-41a. It is rational, the court stated, to recognize that marriage

was adopted "not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." Pet. App. 33a. Further, the court found it rational to act cautiously before changing a universal norm. Pet. App. 36a. Fourth, state reaffirmations of traditional marriage were not triggered by "animus" against gays and lesbians. Pet. App. 41a-47a. Fifth, same-sex marriage was not included within the fundamental "right to marry." Pet. App. 47a-51a. Sixth, the court rejected heightened equal-protection scrutiny for sexual-orientation classifications. Pet. App. 51a-58a. Seventh, the court found no evolving consensus mandating same-sex marriage. Pet. App. 58a-63a.

Recognition. For Ohio's recognition issue, the court started with the Full Faith and Credit Clause. That clause never "'require[d] a State to apply another State's law in violation of its own legitimate public policy.'" Pet. App. 64a (citation omitted). And the Fourteenth Amendment did not change things, because a State could rationally prefer its own laws. Pet. App. 64a-65a. Nor did the refusal to recognize out-of-state same-sex marriage show animus. Petitioners misunderstood Ohio law when they said that "Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it." Pet. App. 66a. Ohio courts had stated that some heterosexual marriages "would not be recognized in the State" even if valid elsewhere. Pet. App. 67a.

SUMMARY OF ARGUMENT

Both *United States v. Windsor*, 133 S. Ct. 2675 (2013), and general Fourteenth Amendment principles prove that if States may decline to license same-

sex marriage, they may decline to recognize same-sex marriages licensed elsewhere.

I. *Windsor*'s facts and its rationales compel a ruling for Ohio.

Federal v. State Recognition. *Windsor* involved *federal* recognition of marriage, which is not specifically addressed by the Constitution. Yet *state* recognition of marriage is addressed by the Full Faith and Credit Clause. That clause has always allowed a State to choose its marriage laws over another State's laws when those out-of-state laws are against its public policy. Petitioners should not be able to avoid that undisputed result merely by asserting a Fourteenth Amendment claim instead.

Federalism. Federalism had "central relevance" to *Windsor*'s holding that Section 3 of the federal Defense of Marriage Act (DOMA) violated the Fifth Amendment. Federalism fosters political liberty (the freedom of communities to govern) and personal liberty (the freedom of individuals against government). *Windsor*, by relying on federalism to interpret the Fifth Amendment, promoted New York's political liberty to decide this question for itself and to foster the personal interests of its citizens. These federalism principles support Ohio. The Court's intervention here would undermine Ohioans' liberty to decide this issue, just as *Windsor* said that DOMA had limited New Yorkers' liberty to do so. And, by nationalizing domestic relations, the Court would erode the very federalist structure that made same-sex marriage possible.

Democracy. *Windsor* supported its decision to invalidate DOMA with democracy-reinforcing ration-

ales at the state level. Our Constitution establishes local debate and consensus as the usual method for social change. That is shown by the First Amendment (which protects debate to facilitate change), and by Article III's judicial-review standards (which leave most social questions to the people). *Windsor* relied on these presumptions. It highlighted both the debate that had occurred in New York, and the unique force that same-sex marriage had obtained through the community's *democratic will*. By tying its Fifth Amendment holding to federalism concerns, moreover, *Windsor* was able to avoid taking sides on the fundamental policy debate occurring within the States about what marriage is. These democracy-reinforcing rationales would be lost if this Court now ruled against Ohio. Such a ruling would say that the decade-long debate in the States has been improper. It would eliminate the possibility of (and requirement for) each community to confront this issue and reach a consensus that respects all sides. And it would forever place into our Constitution only one perspective on marriage.

Animus. The objective factors found to prove improper "animus" in *Windsor* are absent here. This animus doctrine holds that a "bare desire to harm" is not a legitimate state interest. For it to apply, a law must *objectively* have no explanation other than prejudice. Two factors are relevant—whether the government departed from *traditional* practice, and whether it *targeted* a group for novel burdens. *Windsor* concluded that DOMA both departed from the federal government's traditional practice of deferring to state marriages, and targeted same-sex marriages for unusual disadvantages spanning the U.S. Code. Here, however, Ohio acted within its traditional au-

thority when declining to recognize marriages against its public policy. Its decision to retain marriage's traditional definition also did not "target" a class. All agree that traditional marriage arose for purposes unrelated to prejudice. And when acting to retain that definition, Ohioans had an obvious motive—to keep democratic, in-state control of this important issue. To hold that Ohio laws were driven by animus, by contrast, would demean millions of Ohioans by treating their deeply held beliefs about marriage as sheer bigotry, thereby isolating those citizens in a manner at odds with the animus doctrine's very reason for being.

II. Traditional Fourteenth Amendment doctrines confirm that *Windsor* properly left this issue to vigorous democratic debates in each state community.

Fundamental Rights. Heightened scrutiny does not apply because there is no fundamental right to the recognition of out-of-state same-sex marriages. Such a right would conflict with our Nation's traditions in two ways. All States denied the asserted right to same-sex marriage until recently. And a right to "protection and recognition" falls outside the general right to *privacy* within which the specific marriage right sits. Nor has a new consensus emerged for a new right. Even today, a majority of States would adhere to marriage's traditional definition absent federal judicial mandates. And an international perspective does not change the analysis.

Suspect Classifications. Heightened scrutiny also does not apply on the ground that Ohio's recognition laws impose burdens on "discrete and insular minorities." Petitioners mistakenly seek heightened scrutiny for sexual-orientation classifications. This Court

has repeatedly rejected similar requests, and it should stay the course. Unlike other cases that involved *express* discrimination on sexual-orientation grounds, Ohio's void-versus-voidable recognition distinction extends to both opposite-sex and same-sex marriages, and does not reference sexual orientation. Nor could Petitioners show that traditional marriage was retained to discriminate against gays and lesbians. Further, gays and lesbians can gain the attention of lawmakers now more than ever, and any discrimination against them has been on a steady decline. Alternatively, Petitioners mistakenly argue for heightened gender-discrimination scrutiny. Ohio's recognition laws treat each gender equally, and traditional marriage, unlike interracial-marriage bans, was not designed to demean any particular sex.

Rational Bases. That leaves the democracy-enhancing rational-basis test. As the "paradigm of judicial restraint," the test requires only a plausible relationship between a law and a legitimate interest. Under this framework, Ohio rationally chose to recognize only traditional marriages after deciding to license only those marriages. It had a sovereign interest in ensuring that its political processes (not those of other States) decide this profound issue. Ohio citizens also had an interest in ensuring that the issue was resolved by the people, not the courts. The recognition rule, moreover, was a reasonable response to the ease with which Ohio's licensing laws could be evaded by traveling to another State. And it keeps uniformity within state law, preventing the State from having to change many domestic-relations provisions based solely on another State's domestic-relations decisions. The failure to enact a recognition ban also bolsters and implements the State's concern

for caution that justified retaining only traditional-marriage licensing in the first place.

ARGUMENT

As the Sixth Circuit held, whether the Fourteenth Amendment requires States to *license* same-sex marriage "goes a long way toward answering" whether it requires States to *recognize* same-sex marriages licensed elsewhere. Pet. App. 63a. Ohio concedes that if this Court rejects all grounds for retaining marriage's traditional definition, States may not refuse to recognize out-of-state same-sex marriages. But the opposite is also true. If Ohio may constitutionally retain that traditional definition, it may constitutionally prevent this important public policy from being eroded by a quick trip to a nearby State.

Petitioners challenge this view on every level—with claims ranging from substantive due process to equal protection, from sexual-orientation discrimination to gender discrimination, from strict scrutiny to irrationality. Those attacks all fail. Ohio law comports with the Fourteenth Amendment and its various rules, standards, and tiers. Before that specific analysis, though, a bird's-eye view illustrates how disruptive Petitioners' recognition right would be to our constitutional democracy. That right would conflict with *United States v. Windsor*, 133 S. Ct. 2675 (2013), in every way that matters. Ohio thus starts with *Windsor* because it best shows that this issue belongs with communities for collaborative resolution through vibrant democratic debate and consensus.

I. *WINDSOR* LEAVES MARRIAGE RECOGNITION TO FEDERALISM'S ACTIVE DEMOCRATIC PROCESSES

While Petitioners rely primarily on *Windsor* to argue that Ohio must recognize out-of-state same-sex marriages, they flip *Windsor* on its head. Its facts (federal recognition) and its rationales (federalism, democracy, and animus) compel a ruling for Ohio.

A. A Recognition Right Conflicts With The Full Faith And Credit Clause

When interpreting the Fifth Amendment to invalidate DOMA, *Windsor* identified no more specific provision governing *federal* marriage recognition. Here, however, interpreting the Fourteenth Amendment to impose a freestanding marriage-recognition right on *States* overlooks the Full Faith and Credit Clause. U.S. Const. art. IV, § 1. That clause is the "principal constitutional limit on state choice-of-law rules." Pet. App. 64a. While exacting with respect to judgments, it is relaxed with respect to laws. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003). It "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

This "public-policy exception" applies to marriage. "While the application of the public policy exception has varied with courts and circumstances, state conflicts rules have always been open to refusing to recognize certain marriages and classes thereof." Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 Creighton L. Rev. 147, 157-58 (1998). And the Full Faith and Credit Clause does not make "departures from [such] established

choice-of-law precedent and practice constitutionally mandatory." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). The Sixth Circuit thus rightly recognized that the clause permits Ohio's marriage-recognition laws. Pet. App. 64a.

This has significance for whether the Fourteenth Amendment creates a fundamental right to marriage recognition that the Full Faith and Credit Clause does not. The specific governs the general. If a provision "'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process.'" *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (citation omitted). So a party cannot challenge a "search" comporting with the Fourth Amendment under a fundamental-rights approach. *See id.*; *cf. Medina v. California*, 505 U.S. 437, 443 (1992). And if the Free Speech Clause condones speech regulations, a party may not challenge them under a fundamental right to expression. *See Brandenburg v. Hous. Auth.*, 253 F.3d 891, 900 (6th Cir. 2001). Nor can a felon with no Second Amendment right to a firearm, *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010), fall back on a generalized fundamental right to one, *see Gardner v. Vespia*, 252 F.3d 500, 503 (1st Cir. 2001).

If the Fourteenth Amendment does not create "enhanced" criminal-procedure, speech, or firearm rights above those granted by the Bill of Rights, it should not create an "enhanced" recognition right above that granted by the Full Faith and Credit Clause. Indeed, the Court has interpreted the clause loosely for laws because a contrary reading would "enable one state to legislate for [another] or to pro-

ject its laws across state lines" in conflict with our Constitution's federalist structure. *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939). This federalism concern exists no matter what constitutional "label" a plaintiff stamps on the alleged recognition right.

B. A Recognition Right Conflicts With The Constitution's Federalist Design

Windsor interpreted the Fifth Amendment to *protect* federalism. Petitioners interpret the Fourteenth Amendment to *undermine* it.

1. Federalism enhances liberty in the domestic-relations context

a. By "split[ting] the atom of sovereignty" between the federal government and the States, "the Founders established two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Alden v. Maine*, 527 U.S. 706, 751 (1999) (internal quotation marks and citation omitted). They did this not as "an end in itself," but to "'secure[] to citizens the liberties that derive from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). Federalism fosters two distinct liberties.

The first is political liberty—the idea that the people retain authority to govern themselves. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Federalism enhances this freedom by increasing each citizen's ability to have a say on the issues of the day. It "assures a decentralized government that will be more sensitive to the diverse needs of a heterogene-

ous society," "increases opportunity for citizen involvement in democratic processes," and "allows for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

The second is personal liberty—"the idea of freedom from intrusive governmental acts." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Federalism enhances this freedom because "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458. In this way, federalism and the Fourteenth Amendment serve complementary goals; both "ensur[e] that laws enacted in excess of delegated governmental power cannot direct or control [individual] actions." *Bond*, 131 S. Ct. at 2364.

Indeed, federalism can support liberty interests *more* than the Fourteenth Amendment by allowing smaller communities to promote those interests above the amendment's floor. *See Missouri, K. & T. Ry. Co. of Tex. v. May*, 194 U.S. 267, 270 (1904). In this regard, the Fourteenth Amendment prevents only government *interference* with those interests that this Court has found constitutionally protected, *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); it has never compelled government *protection* or *endorsement* of the interest, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). Federalism, by contrast, allows communities to offer that promotion in the face of a conflicting national consensus. When, for example, this Court held that the Fourteenth Amendment does not compel States to subsidize abortion, it added that they *may*

choose to do so if their communities desire. *Maher v. Roe*, 432 U.S. 464, 479-80 (1977). Similarly, when the Court held that the First Amendment does not require religious exemptions from general laws, it added that States *may* grant those religious accommodations. *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 890 (1990).

b. Domestic relations—a "most important aspect of our federalism," *Williams v. North Carolina*, 325 U.S. 226, 233 (1945)—has always been within the "virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). This federalism brings variety. *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). A common-law marriage might be recognized in New Jersey, but not Maryland. *Travers v. Reinhardt*, 205 U.S. 423, 440 (1907). A first-cousin marriage might be recognized in New Mexico, but not Arizona. *In re Mortenson's Estate*, 316 P.2d 1106, 1106-07 (Ariz. 1957). "In a country like ours where each state has the constitutional power to translate into law its own notions of policy concerning the family institution, and where citizens pass freely from one state to another, tangled marital situations . . . inevitably arise." *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring).

Over time, therefore, some have proposed constitutional amendments on the ground that "modern social life is such that there is today a need . . . for vesting national authority over marriage and divorce in Congress." *Id.* at 305; *Marriage and Divorce—Amendments of the Constitution of the United States: Hearing on S.J. Res. 31 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. (1921); 2 Herman Vandenburg Ames, *The Proposed Amend-*

ments to the Constitution of the United States During the First Century of Its History 190 (U.S. Government Printing Office 1897). None succeeded. Federalism has enhanced worth and importance for areas, like domestic relations, about which "people of good faith care deeply" and often disagree. Pet. App. 42a; *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

2. *Windsor* promoted federalism, but a recognition right would erode it

a. *Windsor* described in detail the States' traditional marriage authority. 133 S. Ct. at 2691-92. To be sure, Petitioners correctly note (Pet'rs Br. 30) that *Windsor* did not rest on the *structural-constitutional* ground that DOMA "disrupts the federal balance." *Id.* at 2692. But its pages of federalism were not irrelevant musings. Petitioners overlook *Windsor*'s ultimate holding that "[t]he State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism." *Id.* In other words, what *Windsor* described as the federal government's novel interference with traditional state power played the *central* role in its ultimate conclusion that DOMA was motivated by animus in violation of the Fifth Amendment.

This was nothing new. The Court often interprets constitutional provisions in a manner designed to preserve federalism and state power. It interpreted the Necessary and Proper Clause not to allow Congress to commandeer state officials, citing the "principle of state sovereignty" as the reason. *Printz v. United States*, 521 U.S. 898, 923-24 (1997). It interpreted the Spending Clause to prohibit federal financial coercion of States so as not to undermine their status as "independent sovereigns." *Nat'l Fed'n of*

Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J., op.). And it understood the Commerce Clause as prohibiting federal authority over "family law" despite "the aggregate effect of marriage, divorce, and childrearing on the national economy." *United States v. Morrison*, 529 U.S. 598, 615-16 (2000).

By extending this federalism canon to the Fifth Amendment, *Windsor* sought to promote both political and personal liberty. As for political liberty, *Windsor* noted that New York chose same-sex marriage, but DOMA largely invalidated its choice by creating "two contradictory marriage regimes within the same State." 133 S. Ct. at 2694. As for personal liberty, New York opted to go further than the Fourteenth Amendment compels. New York did not simply avoid *interference* with relationships, *Lawrence*, 539 U.S. at 567; it meant to affirmatively foster the relationships with "*recognition* and *protection*," *Windsor*, 133 S. Ct. at 2695 (emphases added). *Windsor* thus sought to insulate from "a remote central power" New York's ability to grant what its citizens view as each person's proper privileges within the State. *Bond*, 131 S. Ct. at 2364.

b. These rationales support Ohio. Historically, risks to federalism have not originated solely with Congress (as with the Court's concern about DOMA). After all, Justice Brandeis wrote in *dissent* when he noted that a State may "serve as a laboratory" "try[ing] novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Since that era of *Lochner*

v. New York, 198 U.S. 45 (1905), the Court has been far more receptive to his federalism concerns.

The Court's present "practice, rooted in federalism," allows "States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). "'[T]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.'" *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (citation omitted). This is evident in many areas, from education, *id.*, to criminal justice, *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73-74 (2009), to life-and-death matters, *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997), to even today's domestic-relations context, *Sosna*, 419 U.S. at 406-09.

Accordingly, the federalism canon that justified skeptical Fifth Amendment review over federal marriage laws compels lenient Fourteenth Amendment review over state marriage laws. Pet. App. 57a-58a. The federal government disrupts "state sovereign choices" by "'put[ting] a thumb on the scales and influenc[ing] a state's decision as to how to shape its own marriage laws'"—whether it does so through a law by its legislature, *Windsor*, 133 S. Ct. at 2693 (citation omitted), a brief by its executive, U.S. Br. 2, or a judgment by its courts. Indeed, a recognition right forcing Ohio to follow laws passed by *other States* would favor those States' citizens over Ohio's, suggesting that the States are not truly "'*equal* sover-

eign[s]'" in this country. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (citation omitted).

If anything, judicial intervention would be *more* disruptive than the congressional intervention in *Windsor*. It triggers Congress's ability to *directly* regulate States under Section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997). A holding that marriage's longstanding definition—the very "foundation" of state domestic relations, *Windsor*, 133 S. Ct. at 2691—has been infringing the Fourteenth Amendment could create theories for expansive federal domestic-relations laws indeed. *Cf. NASA v. Nelson*, 562 U.S. 134, 163 n.* (2011) (Scalia, J., concurring in judgment). The Court should not permit Congress to do directly (regulate domestic-relations laws) what it criticized Congress less than two years ago for doing indirectly (incentivizing domestic-relations laws).

Harming federalism also restricts liberty. As for political liberty, it no less intrudes on the freedom of Ohioans for the Court to take this issue from Ohio than it limited the freedom of New Yorkers for Congress to take it from New York. Either way, the result removes traditional power from local communities and places it in the federal government's far-removed, yet ever-growing orbit. That federalism's dispersed power (like the separation of powers) "produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Differing marriage laws have always led to conflicts of laws, but federalism justifies that result in liberty's name over the long haul.

"The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

As for personal liberty, Petitioners do not rely on a traditional interest against government *interference* with private conduct as in *Lawrence* and *Casey*. They seek a new liberty interest to government "*protection* and *recognition*" of another State's policy choices about marriage. Pet'rs Br. 33 (emphases added). Outside narrow areas such as racial discrimination "directly subversive of the principle of equality at the heart" of the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), that type of positive right to government assistance is foreign to that amendment, *DeShaney*, 489 U.S. at 195-96 (due process); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (equal protection).

But that right has *always* been within federalism's design to foster. This case proves the point. Only because each community makes its own choice could some States, acting as laboratories, adopt novel same-sex-marriage laws—potentially leading to broader social acceptance. If, instead, the Constitution mandated a national approach, no same-sex marriages would have existed a decade ago. And none would likely exist today given, for example, that a majority of States would still retain traditional marriage absent judicial interference. Pet. App. 59a. In this respect, Australian practice shows federalism's concrete effects. There, marriage *is* a national matter. So the High Court *invalidated* local same-sex-marriage laws conflicting with the national regime. *Commonwealth of Australia v. Australian Capital Territory*, [2013] HCA 55 ¶ 1 (H.C. Austl.

Dec. 12, 2013). By seeking to eradicate the very federalist structure that permitted same-sex marriage, Petitioners undermine its liberty protections for all. These federalism dynamics must not be treated as inconvenient relics of yesteryear now that some States permit same-sex marriage.

C. A Recognition Right Conflicts With The Constitutional Commitment To Democracy And The First Amendment As The Means For Social Change

Windsor, by its terms, sought to *stop* a distant government from disrupting a smaller community's democracy. Petitioners seek to *compel* just that.

1. The Constitution delegates most sensitive policy choices to democratic debates, not judicial mandates

Each State's people, through representatives or referenda, retain authority to decide most policy questions. That is the "underlying premise[] of a responsible, functioning democracy." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality op.). The Constitution entrusts the people initially "with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). It then "foresees the ballot box, not the courts, as the normal instrument for resolving differences." *Schuette*, 134 S. Ct. at 1649 (Breyer, J., concurring in judgment).

This procedure for social change is not limited to mundane matters. The Constitution "does not presume that some subjects are either too divisive or too profound for public debate." *Id.* at 1638 (plurality

op.). Democracy is often "'the appropriate forum'" for "'policy choices as sensitive as those implicat[ing]'" constitutional rights. *Harris v. McRae*, 448 U.S. 297, 326 (1980) (citation omitted). It can resolve delicate questions touching on such things as abortion, *id.*, or religion, *Smith*, 494 U.S. at 890. Two constitutional provisions reinforce these democratic norms in interrelated ways.

First Amendment. The First Amendment highlights the people's *central* role in social change. The "right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). This "'unfettered interchange of ideas'"—not a government decree about the public good—generates the "'political and social changes desired by the people.'" *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014) (citation omitted). The First Amendment thus protects expression not only for its intrinsic value, but also to reinforce the Constitution's "democracy" baseline.

The First Amendment uniquely reinforces democracy in this way. Other amendments are intentionally designed to limit it. The Fourteenth Amendment, for example, originally removed from democratic consideration any notion other than that all "[g]overnment action that classifies individuals on the basis of race is inherently suspect." *Schuette*, 134 S. Ct. at 1634-35 (plurality op.). And when courts interpret that amendment to extend *new* "constitutional protection to an asserted right or liberty interest," *Glucksberg*, 521 U.S. at 720, or an asserted suspect class, *City of Cleburne v. Cleburne Living Ctr.*,

473 U.S. 432, 441-42 (1985), they correspondingly extend the matters placed "outside the arena of public debate and legislative action," *Glucksberg*, 521 U.S. at 720. Courts must always be cautious when doing so because that action has "serious First Amendment implications." *Schuette*, 134 S. Ct. at 1637 (plurality op.). It conflicts with the ideal etched into the First Amendment "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection"—by a court or otherwise. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.).

Article III. Article III's limits on judicial review highlight the courts' *limited* role in social change. As Chief Justice Marshall said when *upholding* democratic action, the Court "must never forget that it is a *constitution* [it is] expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). "Great constitutional provisions," like the Fourteenth Amendment, "must be administered with caution," *Missouri, K. & T. Ry.*, 194 U.S. at 270, because they are "made for people of fundamentally differing views," *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). Courts must avoid inserting into the amendment's capacious language a single generation's answers to "the intractable economic, social, and even philosophical problems" of the day. *Dandridge*, 397 U.S. at 487. Doing so prohibits all future generations from learning, from applying what they learn, and from answering those questions in an ever evolving way.

The Court implements this principle of *neutrality* in policy debates through its deferential standards of review. When asked to recognize a new fundamental right or suspect class that would trigger greater judi-

cial scrutiny of the people, the Court exercises "'self-restraint,'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citation omitted), because that scrutiny is an "extraordinary protection from the majoritarian political process" designed to resolve most disputes, *Rodriguez*, 411 U.S. at 28. Outside those narrow areas, moreover, the Court has made clear that it may not invalidate laws as "unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955). Similarly, the Court is often asked to analyze constitutional issues that rise or fall based on preliminary *factual* questions. Where reasonable people can disagree on those uncertain facts, the Court defers to legislative judgments. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

2. A recognition right would thwart the local democracies *Windsor* fostered

a. *Windsor* concluded that it was undergirding these democratic values. To be sure, it invalidated federal legislation. But it intentionally did so both in deference to one State's democratic debate and without ending the debates in the other States.

Debate. *Windsor* protected the democratic dialogue preceding the New York law. New York had engaged in a "statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." 133 S. Ct. at 2689. But *Windsor* noted that DOMA had sought to end that debate in 1996 before it had even begun. *Id.* at 2682. By invalidating DOMA, therefore, *Windsor* sought to give New Yorkers a real "'voice [to] shap[e] the destiny of their own times.'" *Id.* at 2692 (quoting *Bond*, 131 S. Ct. at 2359).

Consensus. *Windsor* next protected the value that resulted from New York's democratic choice. It identified the unique force that New York same-sex marriages had acquired *because of* the community's democratic will. "When the State used its historic and essential authority to define the marital relation in this way," the Court said, "*its role and its power* in making the decision enhanced the recognition, dignity, and protection of the class *in their own community*." *Id.* (emphases added). It is only New York's democracy that could create the "far-reaching legal acknowledgment" that New Yorkers "deemed" same-sex relationships "worthy of dignity in the community equal with all other marriages." *Id.*

Neutrality. Instead of deciding which of "two competing views of marriage" was best, 133 S. Ct. at 2718 (Alito, J., dissenting), *Windsor* invalidated DOMA in a way that avoided implanting "'a particular school of thought'" into the Constitution, *Dandridge*, 397 U.S. at 484 (citation omitted). By tying its Fifth Amendment holding to DOMA's novel nature, *see* Part I.D, the Court did *not* "remove the subject matter of [marriage] from political debate altogether." *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999) (Wilkinson, C.J., concurring), *aff'd Morrison*, 529 U.S. 598. It instead allocated that debate to the States. In the process, it *highlighted* how reasonable people could disagree over the issue. Marriage's traditional view, *Windsor* said, "for many who long have held it, became even more urgent, more cherished" during this debate. 133 S. Ct. at 2689. "For others, however, came the beginnings of a new perspective, a new insight." *Id.* By refraining from picking sides, *Windsor*

allowed this state debate to continue "as it should in a democratic society." *Glucksberg*, 521 U.S. at 735.

b. *Windsor*'s democracy-reinforcing rationales all support Ohio.

Debate. Allowing each State to resolve marriage policy continues the dialogue that *Windsor* protected. Since DOMA, no issue has been more debated—from legislative chambers to town halls—than marriage. By 2012, 35 States had put this issue on the ballot, some more than once. Initiative & Referendum Inst., *Same-Sex Marriage* (Sept. 2012), *available at* http://www.iandrinstitute.org/BW%202012-1%20Marriage.pdf. Accordingly, what *Schuette* said on another issue has far greater force here: "The Court, by [reversing] the judgment now before it, in essence would announce a finding that the past 15 years of state public debate on this issue have been improper." 134 S. Ct. at 1636 (plurality op.). The Court would announce that Ohioans lack the "voice" that *Windsor* sought to give to New Yorkers. 133 S. Ct. at 2692. And it would announce that the First Amendment could not fairly resolve this question for our country.

Consensus. Allowing each State to resolve marriage policy generates the enhanced dignity from community consensus that *Windsor* also protected. Only through democracy could same-sex marriage "reflect[] both [a] *community's* considered perspective on the historical roots of the institutional of marriage and *its* evolving understanding of the meaning of equality." *Id.* at 2692-93 (emphases added). So if New York's "role and its power" "enhanced" the "recognition, dignity, and protection" of same-sex marriage in the community, it follows that judicial

eradication of the States' role—depriving all States from ever deciding on same-sex marriage—would prevent that same enhanced status from arriving anywhere else. *Id.* at 2692. It is only in communities, not courtrooms, where "the people, gay and straight alike, [can] become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." Pet. App. 69a; *Latta v. Otter*, 2015 WL 128117, at *4 n.8 (9th Cir. Jan. 9, 2015) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Democracy, moreover, is not a zero-sum game. It can have a broader perspective than a case's discrete facts. It is thus unsurprising that, of the dozen or so States adopting same-sex marriage democratically, *id.* at *6 & n.9, most have passed religious-liberty protections in the process. Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 Case W. Res. L. Rev. 1161, Table A3 (2014). None of the courts issuing injunctions can engage in this delicate balance designed to protect the civil rights of all. By obviating the need for democracy to do so, moreover, those injunctions risk preventing natural democratic compromises from ever occurring. *Id.* at 1162. Indeed, this Court has already recognized that democracy is better suited for resolving these types of competing concerns than is the judiciary. *Smith*, 494 U.S. at 890; *cf. Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 694 n.24 (2010).

Neutrality. Allowing each State to resolve marriage policy gives meaning to *Windsor*'s refusal to take sides on the competing views of marriage. *See*

133 S. Ct. at 2718-20 (Alito, J., dissenting). The Sixth Circuit recognized that neutrality is all but impossible here because—for the *States*—the constitutional question turns on choosing between those different understandings of what marriage is and what it is designed to do. Pet. App. 33a-35a. *Windsor* itself suggested that different people can reasonably hold either definition of marriage. 133 S. Ct. at 2689. And Petitioners, too, imply this is an issue "on which '[m]en and women of good conscience can disagree.'" Pet'rs Br. 24 (quoting *Casey*, 505 U.S. at 850). To top it off, "the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know." Pet. App. 37a.

In the face of this reasonable debate and uncertainty, state legislatures, not federal courts, get to choose. *Gonzales*, 550 U.S. at 163. The Fourteenth Amendment no more encapsulates the economic philosophies of Herbert Spencer's "Social Statics," *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting), than it encapsulates the social philosophies of John Stuart Mill's "On Liberty," *but see Baskin v. Bogan*, 766 F.3d 648, 669 (7th Cir. 2014). It leaves those debates—"economic or social"—to the people. *Dandridge*, 397 U.S. at 486. "It is dangerous and demeaning to the citizenry," the Sixth Circuit said, "to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage." Pet. App. 62a. The Court avoided doing so in *Windsor*; it should avoid doing so here.

Petitioners mistakenly suggest that this existence of reasonable debate justifies a holding for them, asserting that a recognition right follows from *Casey*'s admonition that the "Court's obligation is 'to define

the liberty of all,' not to enforce a particular 'moral code.'" Pet'rs Br. 24 (quoting 505 U.S. at 850). But this idea runs both ways. *Casey* said the Fourteenth Amendment prohibits States from imposing their answer to the profound moral question of abortion *on individuals*. And *Lawrence* extended *Casey* by protecting same-sex relationships from State interference. 539 U.S. at 571. But *Maher* found that individuals have no right to impose their answer to the profound moral question of abortion *on the States*, which may "make a value judgment favoring childbirth over abortion" in their public speech, their public spending, and their public services. 432 U.S. at 474. This case—involving a similarly profound issue whether States should "publicly solemnize" same-sex relationships, Pet. App. 40a—is the equivalent of *Maher* as *Lawrence* was the equivalent of *Casey*.

D. A Recognition Right Departs From The Constitution's "Animus" Doctrine

Windsor held that DOMA's *unusual* change proved unconstitutional animus. Petitioners argue that Ohio's *failure* to change does so.

1. The Court's cases invalidate laws that are objectively explainable only on prejudice grounds

"[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *Romer v. Evans*, 517 U.S. 620, 634 (1996). Three factors show this "animus" doctrine's reach.

First, it "is merely an application of the usual rational-basis test: if a statute is not rationally related to any legitimate governmental objective, it cannot be saved from constitutional challenge by a defense that relates it to an *illegitimate* governmental interest." *Lyng v. UAW*, 485 U.S. 360, 370 n.8 (1988). Different cases on the same food-stamp program prove this point. In one, the program's exclusion of households with unrelated members was invalid because no reason explained that exclusion other than prejudice against "'hippies' and 'hippie communes.'" *Moreno*, 413 U.S. at 534-38. In the other, the program's exclusion of households with striking workers was valid because it furthered an interest in labor neutrality distinct from prejudice against strikers. *Lyng*, 485 U.S. at 371-73.

Second, animus does not turn on *subjective* motivations. It turns on whether a law is *objectively* "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Judicial inquiries into legislative "motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). And it is impossible to identify only one purpose animating a diverse citizenry voting on a referendum.

Third, this objective inquiry evaluates two factors—tradition and targeting. If a law departs from tradition, that change could suggest animus. *Romer*, 517 U.S. at 633. "'[D]iscriminations of an unusual character especially suggest careful consideration to

determine whether they'" violate equal protection. *Id.* (citation omitted). Further, if a law "singl[es] out" a group for novel burdens, that targeting, too, could show animus. *Cleburne*, 473 U.S. at 450. Thus, *Cleburne* found that only animus could explain a city's decision not to allow a home for the intellectually disabled where it allowed everything else. *See id.* at 447-48. And *Romer* determined that only animus could explain a novel amendment barring only gays and lesbians from seeking discrimination protections. *See* 517 U.S. at 632.

2. *Windsor* applied animus doctrine, but a recognition right transforms it

a. *Windsor* determined that DOMA's exclusion of same-sex marriages from federal law contained both objective factors that establish animus. The Court initially said that DOMA was an "unusual deviation" from the federal government's "usual tradition of recognizing and accepting state definitions of marriage." 133 S. Ct. at 2693. *Windsor* next noted that DOMA targeted a group—those entering same-sex marriages—for a novel disability. In the rare circumstance where the federal government had departed from state marriage laws, it had done so on a statute-by-statute basis. *Id.* at 2690. But DOMA, *Windsor* found, applied "to over 1,000 federal statutes and the whole realm of federal regulations." *Id.*

b. Petitioners transform *Windsor*: They criticize not an unusual change, but Ohio's failure to change. Yet both animus factors prove the absence of animus from Ohio's decision to retain the status quo.

Tradition. States have long refused to recognize some out-of-state marriages. They *generally* recog-

nized a marriage if it is valid where celebrated. Restatement (Second) Conflicts of Laws § 283 (1971); Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 168 (Little, Brown, & Co. 6th ed. 1865). But that general rule always contained an *exception* for marriages violating public policy. Borchers, 32 Creighton L. Rev. at 154-58. At the time of the Fourteenth Amendment, States would not recognize marriages "prohibited by the public law of a country from motives of policy." Story, *Commentaries* § 113a, at 168; *see, e.g.*, *Williams v. Oates*, 1845 WL 1030, at *3 (N.C. 1845). That exception continued for decades. *See, e.g.*, *In re Stull's Estate*, 39 A. 16, 17-18 (Pa. 1898).

The exception continues today. The "'[l]egislature undoubtedly ha[s] the power to enact what marriages shall be void," notwithstanding "their validity in the state where celebrated." *Cook v. Cook*, 104 P.3d 857, 860 (Ariz. Ct. App. 2005) (citation and emphasis omitted). This exception has been applied in varied circumstances from marriages between relatives, *Catalano v. Catalano*, 170 A.2d 726, 728-29 (Conn. 1961), to common-law marriages, *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 656-57 (Minn. 1979); *Hesington v. Hesington's Estate*, 640 S.W.2d 824, 826-27 (Mo. Ct. App. 1982); to marriages by those lacking legal capacity, *Wilkins v. Zelichowski*, 140 A.2d 65, 69 (N.J. 1958); *Davis v. Seller*, 108 N.E.2d 656, 658 (Mass. 1952).

Ohio exhibits the tradition. Before today's controversy, its Supreme Court had held that many "heterosexual marriages . . . would not be recognized in the State, even if they were valid in the jurisdiction that performed them." Pet. App. 67a (citing

Mazzolini v. Mazzolini, 155 N.E.2d 206, 208-09 (Ohio 1958)). Specifically, Ohio does not recognize any marriages it considers *void* rather than *voidable*, even if the parties married "in another state or country where it was lawful." *State v. Brown*, 23 N.E. 747, 750 (Ohio 1890); *In re Stiles Estate*, 391 N.E.2d 1026, 1027 (Ohio 1979).

Targeting. Marriage's traditional definition does not target same-sex marriages in an "unprecedented" way. *Romer*, 517 U.S. at 633. Even Petitioners do not assert that Ohio's 1803 marriage definition was enacted to discriminate. Nor does Ohio's decision to *retain* that definition (and to decline to follow those States that changed it) prove targeting. As detailed below, *see* Part II.C, that decision had objective purposes such as ensuring that Ohio courts would not find a constitutional right to same-sex-marriage recognition. *Cf. Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

An animus finding, by contrast, belittles many Ohioans—"real people who teach our children, create our jobs, and defend our shores," Pet. App. 45a—by telling them that their views about marriage reflect a "bare . . . desire to harm." *Moreno*, 413 U.S. at 534. That finding would add the "rancor or discord" to this debate that the Court cautioned, in another context, should not be interjected "at the invitation or insistence of the courts." *Schuette*, 134 S. Ct. at 1635 (plurality op.). It also could undermine the religious-liberty protections in States that expanded marriage democratically. After all, "'[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Cleburne*, 473

U.S. at 448 (citation omitted). Traditional marriage should not be treated as a "private bias."

Another case about change confirms the lack of animus from a failure to proceed with it. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), held that Congress failed to show that the States had unconstitutionally discriminated against the disabled so as to justify a damages provision of the Americans with Disabilities Act. *Id.* at 374. There, the ADA's accommodation provisions sprang from "a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments." *Id.* at 376 (Kennedy, J., concurring). Here, same-sex marriages licensed by other States similarly spring from a new view of marriage in those States. There, the plaintiffs alleged that States had acted with animus under *Cleburne* by failing "to revise policies now seen as incorrect under [the] new understanding of proper policy." *Id.* at 375. Here, Petitioners allege that Ohio acted with animus under *Windsor* by failing to revise a definition now seen as incorrect under a new understanding of marriage. But there, as here, the "absence of state statutory correctives" (a disability accommodation or marriage expansion) does not prove "a constitutional violation." *Id.* at 376.

c. Petitioners' arguments are mistaken. As to tradition, they say, "[p]rior to 2004, Ohio followed the firm practice of recognizing all marriages entered out of state, even if the marriages would have been void if performed in Ohio." Pet'rs Br. 4, 28-30, 36-37. This "misapprehend[s] Ohio law, wrongly assuming that Ohio would recognize as valid *any* heterosexual

marriage that was valid in the State that sanctioned it." Pet. App. 66a. Petitioners ignore the distinction between a *voidable* marriage that can be recognized, *Mazzolini*, 155 N.E.2d at 209, and a *void* marriage that cannot be, *Stiles*, 391 N.E.2d at 1027.

As to targeting, Petitioners claim that snippets from the election campaign show the voters' animus. Pet'rs Br. 21-23. Those materials also show an important rationale: to "prohibit judges in Ohio from anti-democratic efforts to redefine marriage." JA170. Regardless, "[i]t is no less unfair to paint the proponent of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families." Pet. App. 45a. Just as alleged animus cannot *save* laws lacking valid grounds, *Cleburne*, 473 U.S. at 448, it cannot *doom* laws with obvious non-animus grounds, *Lyng*, 485 U.S. at 370 n.8; *Garrett*, 531 U.S. at 367.

In sum, marriage's traditional definition does not exist out of animus against gays and lesbians. And this Court should not isolate many ordinary Americans who still adhere to that definition by forever branding their deepest beliefs as irrational prejudices in the eyes of their fundamental charter. "If there is a dominant theme to the Court's cases in this area, it is to end otherness, not to create new others." Pet. App. 45a. An "animus" finding would do just that.

II. General Fourteenth Amendment Standards Confirm That States May Decline To Recognize Out-Of-State Same-Sex Marriages

Windsor's specific teachings about the States' role and power to define marriage are confirmed by standard Fourteenth Amendment principles, which

leave same-sex-marriage recognition to each State's democratic processes. To begin with, heightened scrutiny cannot apply because no "fundamental right" to the recognition and protection of same-sex marriage exists. The Court has been wary about creating such novel rights both to promote experimentation, debate, and consensus within the States, and to preserve the next generation's ability to do so. Nor does the decision to recognize only traditional marriage discriminate along "suspect" lines. In this context, too, the Court has hesitated to create new suspect classifications, especially in the face of state democracies in action. These cases would be particularly poor vehicles for suspect-classification scrutiny because a State's recognition of only traditional marriage cannot be ascribed to intentional discrimination against gays and lesbians. Finally, Ohio had many valid bases for retaining a uniform marriage policy, including the federalism concern with protecting its sovereignty over this important question.

A. Ohio's Recognition Laws Infringe No Fundamental Right

Substantive due process prohibits the government from "infring[ing] certain 'fundamental' liberty interests" without satisfying heightened scrutiny. *Reno*, 507 U.S. at 302. This standard does not justify heightened scrutiny here because Ohio's recognition laws do not infringe a fundamental liberty interest.

1. A recognition right would depart from tradition

A "fundamental" right must be "'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720-21 (citation omitted). For some, this his-

tory is conclusive. Heightened review cannot apply if our Nation has a "tradition of enacting laws *denying* the" alleged fundamental interest. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 & n.2 (1989) (plurality op.). For others, this history is an important "'starting point.'" *Lawrence*, 539 U.S. at 572 (citation omitted). "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Courts undertake this historical analysis with "a careful description of the asserted right." *Reno*, 507 U.S. at 302. History is the one *objective* guidepost in an area fraught with "'scarce and open-ended'" ones. *Osborne*, 557 U.S. at 72 (citation omitted). Here, when carefully assessed, Petitioners' recognition right fails because (a) the right to *marry* has never included *same-sex marriage*, and (b) the right to marry is a *privacy* right, not a right to public *recognition*.

a. *Same-Sex Marriage*. No State permitted same-sex marriage until 2004. JA259. Its novelty shows there could be no tradition compelling one State to *recognize* same-sex marriages performed elsewhere despite the longstanding public-policy exception. *See* Part I.D.2. And the Court's right-to-marry cases cannot fill the historical void. When referencing "marriage," the cases invoked its traditional definition, not a new one. Pet. App. 48a-49a.

Loving, when overturning a criminal conviction, treated *traditional* marriage as the right, and the racist anti-miscegenation law as a *restriction* on it. 388 U.S. at 11-12. It cited the unique relationship between race and the Fourteenth Amendment. *Id.* And those laws had always been viewed as re-

strictions on, not inherent in, marriage. David R. Upham, *Interracial Marriage & the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L.Q. 213, 218 (2015). In the 1870s, they were far from universal. *Id.* at 263. And before this Court wrongly upheld them, *Pace v. Alabama*, 106 U.S. 583 (1883), courts had challenged their validity, *Burns v. State*, 1872 WL 895, *2 (Ala. 1872); Upham, 42 Hastings Const. L.Q. at 265-73. Marriage's opposite-sex rule, by contrast, had always "been thought of by most people as essential to the very definition of that term." *Windsor*, 133 S. Ct. at 2689. That is why *Baker v. Nelson*, 409 U.S. 810 (1972), found it frivolous to assert that same-sex marriage fell within the right protected by *Loving*.

Zablocki v. Redhail, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), reinforce this view. Unlike here, the States there did *not* identify a long "tradition of enacting laws *denying* the" right to the challengers. *Michael H.*, 491 U.S. at 122 n.2 (plurality op.). Wisconsin did not contest that its criminal ban on marriage by child-support debtors was "unprecedented." *Zablocki*, 434 U.S. at 404 (Stevens, J., concurring in judgment). And Missouri conceded that the prisoner's requested marriage fell within the right, arguing only that the prison context extinguished it. *Turner*, 482 U.S. at 95.

b. *State Recognition.* A right to government "protection and recognition" of same-sex marriage would be equally novel. Pet'rs Br. 33. The Fourteenth Amendment's substantive component affords heightened protection "'against unwarranted *government* interference'" with a liberty interest; it has never "'confer[red] an entitlement'" to government protec-

tion of that interest. *Deshaney*, 489 U.S. at 196 (citation omitted). So fundamental-rights cases "involve[] legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right." *Rodriguez*, 411 U.S. at 38; *Lyng*, 477 U.S. at 638. A fundamental right is a right *against* government, not a right *to* government.

This distinction permeates right-to-privacy cases. Parents have a right against government interference with their children's private education. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). But that does not include a right to aid for the school. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). Families have a right against government interference with their living together. *Moore v. City of East Cleveland*, 431 U.S. 494, 504-05 (1977) (plurality op.). But that does not include a right to assistance for the house. *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972). Couples have a right against government interference with their bearing children. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). But that does not include a right to have the government feed "large families." *Dandridge*, 397 U.S. at 475. And the Court has said that individuals have a right against government interference with access to abortion. *Casey*, 505 U.S. at 846. But that does not encompass a right to promotion of that choice. *Rust v. Sullivan*, 500 U.S. 173, 201-02 (1991).

This dichotomy controls here. "[T]he right to marry is part of [this] fundamental 'right of privacy.'" *Zablocki*, 434 U.S. at 384; *Paul v. Davis*, 424 U.S. 693, 713 (1976). Accordingly, just as similar right-to-privacy cases were not later followed by decisions creating a right to government protection and en-

dorsement, so *Lawrence* should not later be followed by such a right to government protection and endorsement in the marriage context either.

A positive right to protection and recognition would generate uncertainty. As for recognition, the Sixth Circuit said it would cause confusion over other relationships that the State must endorse. Pet. App. 50a-51a. As for protection, it would cause confusion over items that must be provided. Must States indefinitely retain the marital evidentiary privilege? *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). Or the presumption of legitimacy? *Michael H.*, 491 U.S. at 124 (plurality op.). In sum, "something can be fundamentally important"—like a proper education, adequate shelter, sufficient food, or good health—"without being a fundamental right." Pet. App. 47a.

2. No new consensus shows a new right

"[N]o national consensus has yet emerged" that could trump these traditions. *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

a. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Graham v. Florida*, 560 U.S. 48, 62 (2010) (citation omitted). The current consensus supports Ohio. A dozen or so States have adopted same-sex marriage legislatively. *Latta*, 2015 WL 128117, at *6 & n.9 (O'Scannlain, J., dissenting from denial of rehearing en banc). Over 30 would adhere to traditional marriage without intervention by *federal* courts. Pet. App. 59a. This cannot show a "national consensus" for same-sex marriage or its recognition.

Fundamental-rights cases confirm this. Some 34 States permitted interracial marriage at the time of *Loving*. 388 U.S. at 6 n.5. Similarly, the law invalidated in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was an "utter novelty," *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting). And when *Lawrence* protected intimate same-sex relationships, 37 States permitted the conduct. 539 U.S. at 573. Finally, while States prohibited abortion at the time of *Roe v. Wade*, 410 U.S. 113 (1973), the Court, whether right or wrong, "spent about a fifth of [its] opinion negating the proposition that there was a longstanding tradition" of such laws. *Michael H.*, 491 U.S. at 127 n.6 (Scalia, J., op.). Here, the current consensus cannot be overlooked by calling it "of relatively recent vintage." *Compare Roe*, 410 U.S. at 129, *with Windsor*, 133 S. Ct. at 2689.

Eighth Amendment cases prove the same. When *Atkins v. Virginia*, 536 U.S. 304, 314-15 (2002), and *Roper v. Simmons*, 543 U.S. 551, 564 (2005), found a consensus against capital punishment for certain individuals, 30 States prohibited such punishment. By comparison, the decisions that *Roper* and *Atkins* overruled found *no* consensus since some 34 States permitted capital punishment in one context, *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989), and some 25 permitted it in the other, *Stanford v. Kentucky*, 492 U.S. 361, 370-71 n.2 (1989). Like *Penry* and *Stanford*, and unlike *Atkins* and *Roper*, there is no *legislative* consensus for same-sex marriage.

b. "Measures of consensus other than legislation" reinforce that no recognition right exists. *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008). *Lawrence* noted that the laws there did "not seem to have been en-

forced against consenting adults," which made "it difficult to say that society approved" of them. 539 U.S. at 569; *Kennedy*, 554 U.S. at 433. Here, Petitioners identify no State that—while it formally had a traditional-marriage law on the books (as Ohio did in 1803)—permitted same-sex marriage *in practice*. Further, that many States *reaffirmed* traditional marriage recently (as Ohio did in 2004) shows that the laws cannot be viewed as resting on outdated enactments. Pet. App. 42a. If the lack of enforcement in *Lawrence* supported invalidating the laws, the universal enforcement and recent reaffirmations support upholding them.

International views only confirm this. While many of the 47 members of the Council of Europe allow civil unions, no more than 12 authorize same-sex marriage or have future plans to. *Hämäläinen v. Finland*, No. 37359/09 ¶ 31 (Eur. Ct. H.R. July 16, 2014). "[I]t cannot be said that there exists any European consensus on allowing same-sex marriages." *Id.* ¶ 74. Globally, fewer than 20 of the 193 U.N. members have adopted same-sex marriage. Pew Res. Ctr., *Gay Marriage Around the World*, *available at* http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world (last visited Mar. 24, 2015). The consensus, moreover, favors *democratic* change. European same-sex marriage "has come exclusively from legislatures, and not from the judiciary." David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 Berkeley J. Int'l L. 195, 201 (2014). As the European Court of Human Rights noted, "it must not rush to substitute its own judgment in place of that of the national authorities." *Schalk and Kopf v. Austria*, No. 30141/04, ¶ 62 (2010). This Court considered

that court's views of "importance" in *Lawrence*, and they remain relevant here. 539 U.S. at 573.

B. Ohio's Recognition Laws Do Not Discriminate Along Suspect Lines

Three tiers of equal-protection scrutiny apply to statutes that offer benefits to certain individuals but not others. Strict scrutiny governs laws that discriminate based on the suspect classifications of race, alienage, or national origin. *Cleburne*, 473 U.S. at 440. Intermediate scrutiny governs laws that discriminate based on the quasi-suspect classifications of gender and legitimacy. *Id.* at 440-41. Rational-basis scrutiny governs the rest. *Id.* at 442. Petitioners' efforts to change this framework (by establishing a new quasi-suspect classification), and their efforts to work within it (by equating marriage with gender discrimination) are both mistaken.

1. Ohio's recognition laws are not subject to heightened scrutiny based on sexual orientation

Petitioners (and the United States) ask this Court to do something it has not done in decades: create a new quasi-suspect classification (sexual orientation) triggering heightened scrutiny. Pet'rs Br. 38-48; U.S. Br. 15-25. Yet the Court's precedent forecloses the option. And it would make little sense to depart from that precedent in these cases. Unlike *Romer*, they involve neutral recognition laws whose impact on sexual orientation was not intentionally discriminatory. Further, the ability of gays and lesbians to participate in the political process has only increased, so the traditional rationales for applying heightened scrutiny are less persuasive today.

a. *Precedent.* This Court has repeatedly been asked to apply heightened scrutiny to laws allegedly discriminating based on sexual orientation, and it has consistently refrained from doing so. *Windsor* invalidated DOMA on animus grounds, not on the heightened scrutiny requested by the United States. 133 S. Ct. at 2693-95. It followed the course set by *Romer*, which also applied animus doctrine and not the strict scrutiny chosen by lower courts. 517 U.S. at 625, 634. And both cases comport with *Baker*, which necessarily applied rational-basis review when rejecting the requested heighted scrutiny "for want of a substantial federal question." 409 U.S. at 810.

Petitioners' two precedent-based arguments are mistaken. They claim that *Windsor*'s animus rationale represents heightened scrutiny under another name. Pet'rs Br. 38. Not so. The doctrine is "merely an application of the usual rational-basis test." *Lyng*, 485 U.S. at 370 n.8. That is why *Romer* found that the law lacked "a rational relationship to a legitimate governmental purpose," 517 U.S. at 635, and why *Windsor* spoke in terms of DOMA having "no legitimate purpose," 133 S. Ct. at 2696; *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (equating rational-basis test with animus doctrine).

Petitioners next suggest that the Court should apply the rational-basis test *only* to economic laws like those "regulating packaged milk." Pet'rs Br. 40. Yet *Dandridge* applied rational-basis review despite "the dramatically real factual difference between" business regulations and the welfare laws at issue there "involv[ing] the most basic economic needs of impoverished human beings." 397 U.S. at 485. Since

then, the Court has applied rational-basis review to laws discriminating against the disabled, *Cleburne*, 473 U.S. at 442-46, the elderly, *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976), close relatives, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and the impoverished, *Harris*, 448 U.S. at 323. In doing so, the Court did not demean these individuals' dignity; rather, it recognized that it "is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection." *Rodriguez*, 411 U.S. at 33.

b. *Invidious Intent.* It would make little sense to depart from prior precedent *in these cases*. *Romer* chose rational-basis review for an amendment that *explicitly* discriminated against gays and lesbians. 517 U.S. at 624. The amendment barred all municipal anti-discrimination protections for "gays and lesbians" in particular, while permitting those protections for the majority of straight individuals. *Id.* The law to that extent was facially discriminatory.

Here, however, Ohio's recognition framework—distinguishing void from voidable marriages—does not classify on sexual-orientation lines. "[A] number of heterosexual marriages," for example, fall on the *void* side of the line. Pet. App. 67a. And, as the New York Court of Appeals held, even the decision to place same-sex marriages in this category applies to all individuals no matter their orientation. *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006). It would be odd for the Court to apply heightened scrutiny to Ohio's neutral recognition framework when it refused to apply such scrutiny to Colorado's anti-anti-discrimination amendment.

Instead, under the Fourteenth Amendment, laws with differential impacts generally require challengers to show that the laws were passed to *intentionally* discriminate against the group affected. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979); *Washington v. Davis*, 426 U.S. 229, 240 (1976); *cf. Christian Legal Soc'y*, 561 U.S. at 694 n.24. Traditional-marriage laws are not intentionally discriminatory. The traditional definition "goes back thousands of years and spans almost every society in history," but "'laws targeting same-sex couples did not develop until the last third of the 20th century.'" Pet. App. 53a (quoting *Lawrence*, 539 U.S. at 570).

The United States responds that this intent element need not be shown because Ohio's recognition framework forecloses a "class of marriages into which only lesbian and gay people are likely to enter." U.S. Br. 16. But Ohio's framework extends beyond same-sex marriage, Pet. App. 67a, and the United States' cases undermine its position. *Windsor* did not apply heightened scrutiny. *See* Part I. *Christian Legal Society* did not even address this issue. It instead upheld state action against a First Amendment challenge, holding that a university's "all-comers" policy neutrally applied to all student organizations and did not intentionally target the religious group challenging it. 561 U.S. at 695-96. And *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), rejected the notion that courts may discard the usual intent element even when a law has an *exclusive* impact on a class. *Id.* at 271-72. While laws disfavoring abortion apply as to women *only*, challengers must still show an intent to discriminate along gender lines to prove a constitutional violation. *Id.* Just as one can oppose abortion for reasons "other than hatred of, or

condescension toward . . . women," *id.* at 270, one can support traditional marriage for reasons other than prejudice toward gays and lesbians, *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

c. *Democracy Defect.* It would also make little sense to depart from prior precedent *today*. *Baker* was decided in 1972; *Romer* in 1996. If the theory for new quasi-suspect classes did not justify heightened scrutiny in those cases, it cannot justify it now. As a famous footnote says, that theory rests on the notion that "prejudice against [a] discrete and insular minorit[y]" has "seriously . . . curtail[ed] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Yet any "changed circumstances" between *Baker*, *Romer*, *Windsor*, and today's cases show *more*—not *less*—reason to trust democracy to resolve these issues. *Casey*, 505 U.S. at 864 (joint op.).

To begin with, protected-class status is reserved for those "relegated to such a position of political powerlessness," *Rodriguez*, 411 U.S. at 28, as to have "no ability to attract the attention of the lawmakers," *Cleburne*, 473 U.S. at 445. Even "the most modest powers of observation," the Sixth Circuit noted, show that political invisibility is not an issue today. Pet. App. 56a. As these appeals illustrate, gays and lesbians have "attract[ed] the attention of the lawmakers" at *every* level of government. At the federal level, the executive branch filed an *amicus* brief, as did some 167 Representatives and 44 Senators. Not only that, with respect to DOMA, the executive branch's strong support led it to the "unusual position" of failing "to defend the constitutionality of an Act of Con-

gress based on a constitutional theory not yet established in judicial decisions" and that was rejected by four Justices. *Windsor*, 133 S. Ct. at 2687-88. At the state level, 19 States filed four *amicus* briefs in these cases challenging the laws of their sister sovereigns. Further, several state officers have, like the federal government, "refused to defend" their own laws. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013). At the local level, some 226 Mayors and many of the largest cities expressed support.

On the specific issue before the Court, moreover, a dozen or so States have already passed legislation expanding marriage democratically. *Latta*, 2015 WL 128117, at *6 & n.9 (O'Scannlain, J., dissenting from denial of rehearing en banc). And statistical work buttresses the "widely held assumption" expressed by the Sixth Circuit, Pet. App. 57a, that same-sex marriage seems to be "'virtually unique among all major public policy issues'" in its ongoing ability to attract increasing support. *Wilson*, 64 Case W. Res. L. Rev. at 1201 (quoting Nate Silver, *How Opinion on Same-Sex Marriage is Changing, and What it Means*, N.Y. Times (Mar. 26, 2013)).

In addition, while there is no question that "gay individuals have experienced prejudice in this country," Pet. App. 52a, here too the facts have changed for the better for Petitioners' cause. "As of 2015," for example, "eighty-nine percent of Fortune 500 companies provide non-discrimination protection for their LGBT employees, and sixty-six percent offer benefits to same-sex partners." *Amicus* Br. of 379 Emp'rs and Orgs. Representing Emp'rs at 20. And, as the Court has already held, "there is no longstanding history in this country of laws directed at homosexual conduct

as a distinct matter." *Lawrence*, 539 U.S. at 568. This, for example, is not an area like race or gender "in which the local, state, and federal governments historically disenfranchised the suspect class." Pet. App. 56a; *cf. Cleburne*, 473 U.S. at 461-64 (Marshall, J., concurring in the judgment in part and dissenting in part).

Finally, as the Sixth Circuit noted, gays and lesbians are far less insulated today as more and more individuals have "been forced to think about the matter through the lens of a gay friend or family member." Pet. App. 57a. Most of the population knows individuals who are "openly gay." *Id.*; JA216.

At day's end, the Court has been "very reluctant" to establish new suspect classes given "our federal system and . . . [its] respect for the separation of powers." *Cleburne*, 473 U.S. at 441. That scrutiny constitutes an "extraordinary protection from the majoritarian political process" through which most questions are resolved. *Rodriguez*, 411 U.S. at 28. It should not be undertaken now. If anything, it is *litigation* that has stalled *democracy*. Those who would have proceeded politically in some States "have opted to take a wait-and-see approach . . . as federal litigation proceeds." Pet. App. 43a. Ohio same-sex-marriage supporters, for example, remain in the process of placing a repeal on the ballot. Ohio Ballot Board, Pending Statewide Ballot Issues, *available at* http://www.sos.state.oh.us/SOS/LegnAndBallotIssues/BallotBoard.aspx (last visited Mar. 24, 2014).

2. Ohio's recognition laws do not discriminate against any gender

Petitioners spend little space discussing the oft-rejected claim that Ohio's recognition laws trigger heightened gender-discrimination scrutiny. Pet'rs Br. 48-49. Those laws treat both genders *equally*; they do not favor one over the other. For such a neutral law, a challenger generally must prove that the State enacted the law with discriminatory intent toward one gender. *Feeney*, 442 U.S. at 274. Petitioners have never made that showing. *See Conaway v. Deane*, 932 A.2d 571, 599-600 (Md. 2007); *Hernandez*, 855 N.E.2d at 20.

Petitioners instead argue that even laws that "give no preference to women or men" are subject to heightened scrutiny if they *expressly* reference the sexes. Pet'rs Br. 48. No case supports that claim. *United States v. Virginia*, 518 U.S. 515 (1996), which involved *unequal* treatment of women, recognized that the Court's gender-discrimination cases applied "skeptical scrutiny of official action denying rights or opportunities based on sex." *Id.* at 531. And all of the Court's other "landmark decisions" in this area invalidated "statutes that differentiated between men and women as discrete classes for the purposes of unequal treatment." *Conaway*, 932 A.2d at 595 n.25 (citing cases). Traditional marriage does no such thing. "Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

Finally, one of Petitioners' authorities unfairly equates traditional marriage with racist anti-miscegenation laws. *Latta v. Otter*, 771 F.3d 456,

482-83 (9th Cir. 2014) (Berzon, J., concurring). But those interracial-marriage bans had a discriminatory *purpose* "to maintain White Supremacy." *Loving*, 388 U.S. at 11. And "'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.'" *Johnson v. California*, 543 U.S. 499, 506 (2005) (citation omitted). The Court has, by contrast, never "equat[ed] gender classifications, for all purposes, to classifications based on race." *Virginia*, 518 U.S. at 532; *cf. Parham v. Hughes*, 441 U.S. 347, 355 (1979) (plurality op.).

C. Ohio's Recognition Laws Rationally Promote Important State Interests

Ohio rationally chose to *recognize* only traditional marriages after deciding to *license* only those marriages. Again, Ohio concedes that if it must license same-sex marriages, it cannot refuse to recognize them. But these cases ask whether Ohio may constitutionally choose its *valid* marriage definition over another State's expanded one. It may. The very way Petitioners frame their arguments proves this. They largely (and quite wrongly) challenge reasons for traditional-marriage *licensing* while ignoring the grounds for *recognition* identified by the Sixth Circuit. Pet'rs Br. 50-60. Equally revealing, the United States departs from Petitioners by relying *solely* on heightened scrutiny, recognizing that Petitioners' "rigorous" rational-basis arguments would endanger much of the U.S. Code. U.S. Br. 25-31.

1. As the "paradigm of judicial restraint," *F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 314 (1993), the rational-basis test implements the Constitution's preference for democracy. It prohibits this Court from "sit[ting] as a superlegislature to judge the wis-

dom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Heller v. Doe*, 509 U.S. 312, 319 (1993). Instead, the test asks only if a plausible relationship exists between the law and a "'legitimate governmental purpose.'" *Garrett*, 531 U.S. at 367 (citation omitted). It brings a "strong presumption of validity," *Heller*, 509 U.S. at 319, placing the burden "'on the one attacking the legislative arrangement to negative every conceivable basis which might support it,'" *id.* at 320 (citation omitted).

Specific principles show just how much the test reinforces democracy. It matters not if the reasons offered in court are the reasons why lawmakers (or voters) approved the law. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). The basis may be "rational speculation unsupported by evidence or empirical data." *Beach*, 508 U.S. at 315. Further, "'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966) (citation omitted); *Johnson v. Robison*, 415 U.S. 361, 378 (1974). So the test permits "imperfect" line-drawing that is "both underinclusive and overinclusive" to the interests advanced. *Vance v. Bradley*, 440 U.S. 93, 108 (1979). Rough approximations suffice; "mathematical nicety" is never required. *Dandridge*, 397 U.S. at 485.

2. Ohio had important grounds for declining to recognize out-of-state same-sex marriages once it decided not to license those marriages.

In-State Control. Ohio had a rational—indeed, a sovereign—interest in wanting its political processes

(not those of other States) to decide this issue *within its borders*. As one legislator noted, "[t]here's no judge in Massachusetts who is accountable to one person who lives in this state, but we all are. And that's why it is important that we retain the policy, power in Ohio to decide on what is marriage." *Obergefell* Doc.41-6, Becker Decl. Ex. E, PageID#351 (Rep. Grendell). Ohio did not "behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State." Pet. App. 64a.

To find this concern for in-state control unconstitutional, the Court would have to set aside a century's worth of precedent. "A basic principle of federalism is that each State may make its own reasoned judgment" about matters "within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003); *House v. Mayes*, 219 U.S. 270, 282 (1911) (state may "regulate the relative rights and duties of all within its jurisdiction"). As one example, a State may exercise "jurisdiction over nonresidents who are physically present in the State" no matter how temporarily. *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604, 610 (1990) (plurality op.). As a second example, "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985). The public-policy exception provides a third, resting on the view that a State can pick its laws over another State's. *See The Kensington*, 183 U.S. 263, 269 (1902); *Knott v. Botany Worsted Mills*, 179 U.S. 69, 71 (1900). This exception and these cases would make no sense if the Constitution dictated an out-of-state choice. Pet. App. 65a. Ohio's decision to

prefer its laws over out-of-state laws fits squarely within this framework.

Conversely, a State's sovereign authority is generally limited to *its* territory. "Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). That is true even when the State's citizens travel outside the State. "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975). Thus, Petitioners' suggestion that *out-of-state* laws should take precedence over Ohio's "democratic processes" has it backwards. Pet'rs Br. 52. In any other context, such a suggestion would be treated not just as a misguided view, but as a potentially unconstitutional one.

Democratic Preservation. Ohio's concern with in-state control was magnified by the *method* in which other States had been adopting same-sex marriage. Ohio's legislatures and citizens rationally feared that the State would surrender this important choice to either in-state or out-of-state courts. The recognition provisions in Ohio's statutes and constitution were rational responses to this democracy concern.

As for Ohio's statutes, legislators were "not willing to leave it to courts to define what Ohio's public policy might be," *Obergefell* Doc.41-6, Becker Decl. Ex. E, PageID#340 (Rep. Seitz), and believed that "the people of Ohio deserve to have their representatives decide the public policy of this state." *Id.* PageID#351 (Rep. Grendell). These concerns were well-

founded. In jurisdictions where legislatures did nothing, courts found that out-of-state same-sex marriages were valid precisely because the legislatures had done nothing. *See Port v. Cowan*, 44 A.3d 970, 977-82 (Md. 2012); *Christiansen v. Christiansen*, 253 P.3d 153, 156-57 (Wyo. 2011). And the Ohio Supreme Court had already suggested that it might recognize a marriage unless the legislature considered it "void." *Mazzolini*, 155 N.E.2d at 209.

As for Ohio's Constitution, the amendment was the *only* way for Ohio voters to ensure that their state courts would not declare a right to same-sex-marriage recognition, similar to what other courts had already done. *See Goodridge*, 798 N.E.2d at 969. Petitioners cannot identify any way in which Ohioans could protect their democratic choices against such a possibility *without* amending the constitution. Nor is there anything nefarious with doing so. "A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for" deciding such an important issue. *Alden*, 527 U.S. at 752.

Evasion. The recognition rule "discourages evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home." Pet. App. 65a. That concern has a long pedigree. Restatement (First) of Conflict of Laws § 132 cmt. e (1934); 1 Francis Wharton, A *Treatise on the Conflict of Laws* § 181 (1905). Such marriages do not invoke comity concerns with other States because the parties never "'acqui[re] . . . domicile'" in those States. *In re Stull's Estate*, 39 A. at 20 (citation omitted). And even the demanding full-faith-and-credit rules applicable to divorce *judgments* do not

require a State to recognize out-of-state divorces if "cogent evidence" suggests the divorcees were the State's citizens. *Sosna*, 419 U.S. at 407-08.

This concern has only grown stronger in the modern age of easy travel. Ohio's licensing law would mean little if Ohioans could travel on vacation, get married, and then return home with the marriage due full recognition in the State. Today's Ohio cases show that this concern is real; many of the same-sex couples in those cases traveled from their home State to another to get married. *See, e.g.*, JA25 (Maryland); JA394 (New York). If anything, to recognize out-of-state same-sex marriages while not licensing such marriages in the State could itself be deemed irrational. It would end up prohibiting same-sex marriage *only* for those citizens who lack the means to travel. Ohioans could rationally think that marriage status should not be decided in this fashion. *Cf. Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

Further, it was rational to have a bright-line rule that encompasses all same-sex marriages, including those who marry in their home State and then move to Ohio. Rational-basis review permits general approximations. Pet. App. 39a (discussing *Murgia*, 427 U.S. 307). And a bright-line rule (rather than a marriage-by-marriage approach) eliminates the administrative difficulties of distinguishing between the two types of marriages in each case. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012).

Uniformity. Ohio's recognition decision also follows from administrative concerns after it decided to retain traditional-marriage licensing. *Id.* A recognition decision would require more than a narrow one-time "accommodation." Because marriage is the

"foundation of the State's broader authority to regulate the subject of domestic relations," *Windsor*, 133 S. Ct. at 2691, it implicates many legal areas such as family, tax, property, evidence, and tort law.

Unlike with, say, first-cousin marriages, *Mazzolini*, 155 N.E.2d at 209, Ohio would need to assess many provisions framed in gender-specific language to determine how to reconcile its laws with same-sex marriage. *See, e.g.*, Ohio Rev. Code §§ 3705.09(F) (child's mother designates surname); 3111.03 (presumption of husband's paternity and natural fatherhood); 3107.0611 (notice of possible adoption designates putative father and birth mother); 3111.97 (parentage rules for embryo donation); 5121.21(E) (recovery for certain expenses); 5747.08(E) (joint tax returns). Also unlike with those rarer marriages, moreover, same-sex-marriage recognition could involve thousands of couples within the State. Gary Gates, *Same-Sex Couples in Ohio, April 2014*, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/OH-same-sex-couples-demo-apr-2014.pdf.

Stability. Lastly, the rationales for traditional-marriage licensing extend to recognition as well. To give the most obvious example, "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. App. 36a. But this cautious approach would have been incoherent unless the State retained the status quo for *all* individuals inside the State, including those who married outside of it.

Petitioners' contrary argument—that a State must rationally accept all marriages once another State decides to license those marriages, Pet'rs Br.

53—would destroy the federalist structure that protects liberty. Part I.B. Under that view, the Constitution would instantly export any State's novel creation of same-sex marriage (or any other) to all other 49 States. One State—indeed, one State's judiciary—would govern the Nation's domestic relations. This conflicts with first principles. It makes no sense to allow States to be laboratories of democracy "without risk to the rest of the country" if the other States are not allowed to wait and see whether the sister State's novel changes work. *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting).

* * * *

In the end, whatever specific standards the Court chooses, it should hold that the Fourteenth Amendment allows States to decline recognition of same-sex marriage. "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014). This is true for marriage on two levels. The specific *practice* of traditional marriage is deeply rooted. *Windsor*, 133 S. Ct. at 2689. More than that, *Windsor* illustrates that the traditional *methods* for departing from that traditional practice—federalism and democracy—are also deeply rooted. *Id.* at 2691-92. During the past decade, those methods have worked in "settl[ing] the issue in a productive way." Pet. App. 69a. The Court should continue to let those processes do their work. If it rightly upholds the States' power to be self-governing democracies in the licensing context, it should not undercut that ruling by ordering its reversal in all but name through anti-democratic means in the recognition context.

CONCLUSION

The Court should affirm the Sixth Circuit's judgment.

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